Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY, Petitioner, **vs.** **STEVEN CAMBRA, Warden,** Respondent.	No. C 97-2232 FMS (PR) **ORDER DENYING MOTION TO VACATE ORDER AND TO DISMISS PETITION AS UNTIMELY**

I.

Petitioner, a state prisoner proceeding pro se, first filed a federal petition for a writ of habeas corpus on April 23, 1997. Because the petition contained both unexhausted and exhausted claims, it was dismissed without prejudice. See Anthony v. Cambra, No. C 97-1474 FMS (PR), slip op. at 1-2 (N.D. Cal. May 22, 1997) (order of dismissal). Petitioner filed a new petition on June 13, 1997 alleging only an exhausted claim: the government violated its immunity agreement and denied petitioner his right against self-incrimination and to due process by using information he provided to them against him. The court found that petitioner's claim, liberally construed, was cognizable under 28 U.S.C. § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be issued. See July 8, 1997 Order at 2-3.

On September 23, 1997, petitioner informed the court that in June 1997 he submitted with his petition a motion to hold the petition in abeyance, but that the motion was not file stamped. He requested that the court rule on his motion and stay the petition containing one exhausted claim while he exhausted five

additional claims that were pending in the Supreme Court of California since April 18, 1997. Petitioner later would seek to amend his federal petition to include the additional claims once they were exhausted and thereby avoid piecemeal litigation in federal court. The court asked respondent to address the motion and, after petitioner filed a reply, granted it. See Oct. 29, 1997 Order at 2-5.

Respondent now moves for reconsideration and requests that the court vacate its October 29, 1997 order and dismiss the petition as untimely. Respondent argues that: (1) the instant petition containing one exhausted claim is time barred because it was filed on June 13, 1997, more than 2 months after the period of limitation expired on April 23, 1997; and (2) petitioner's state petition (containing the five additional claims) cannot toll the period of limitation because it was not actually filed in the Supreme Court of California until April 25, 1997, two days after the period of limitation expired. For the reasons set forth below, the motion is denied and the court's October 29, 1997 order is amended.

II.

In Rose v. Lundy, 455 U.S. 509, 510 (1982), the Supreme Court directed district courts to dismiss "mixed petitions" containing both exhausted and unexhausted claims and leave "the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the distruct court." Many district courts implemented Rose v. Lundy by routinely dismissing mixed petitions without prejudice to filing a new petition containing only exhausted claims or containing all claims once they are exhausted in state court. Under this "dismissal without prejudice to filing a new petition" approach, the prisoner is not afforded an opportunity to amend or resubmit his petition with only exhausted claims. This approach affords the district court better management and control over its docket (e.g., the court need not monitor whether the prisoner amends

or resubmits his petition) and, as long as there is no time limitation on the filing of the new petition, causes no detriment to the prisoner. The recent enactment for the first time of a one-year statute of limitation on the filing of a federal habeas petition[1] makes the "dismissal without prejudice to filing a new petition" approach no longer appropriate, however, as this case illustrates.

Petitioner filed a federal petition just before the new one-year period of limitation expired on April 23, 1997 and sought to raise all of his cognizable claims (exhausted and unexhausted).[2] The court dismissed the mixed petition under the "dismissal without prejudice to filing a new petition" approach and did not afford petitioner an opportunity to amend or resubmit his petition with only exhausted claims. See Anthony v. Cambra, No. C 97-1474 FMS (PR), slip op. at 2 (N.D. Cal. May 22, 1997) (order of dismissal). Petitioner nonetheless promptly filed a new petition containing only an exhausted claim on June 13, 1997.

If petitioner had been afforded an opportunity to amend or resubmit his petition with only exhausted claims, his June 13, 1997 filing would relate back to April 23, 1997 and unquestionably be timely. See Fed. R. Civ. P. 15(c). The court's dismissal of the original petition under the "dismissal without prejudice to filing a new petition" approach did not afford petitioner such an opportunity. Equity requires that the June 13, 1997 filing be construed as an amendment or

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1. The Antiterrorism and Effective Death Penalty Act of 1996 became law on April 24, 1996 and imposed a one-year statute of limitation on federal habeas petitions filed by state prisoners. See 28 U.S.C. § 2244 (d).

2. A prisoner with a conviction finalized before April 24, 1996, as is the case here, had at least until April 23, 1997 to file his habeas petition. See Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997) (allowing § 2244 (d)'s limitation period to commence before AEDPA's enactment would have impermissible retroactive effect), cert. denied, 118 S. Ct. 899 (1998).

resubmission to the original petition filed on April 23, 1997 and be considered timely. See Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988) (court may accept resubmitted petition with only exhausted claims nunc pro tunc to date of original filing).

The new statute of limitation on the filing of federal habeas corpus petitions requires that district courts provide prisoners who file mixed petitions with an opportunity to strike their unexhausted claims and amend or resubmit their petitions so that their amendment or resubmission can relate back to the date of the original filing and not be time-barred.

III.

The instant petition also may be timely, as a matter of law, if the limitation period was tolled by petitioner's state habeas petition pursuant to 28 U.S.C. § 2244 (d) (2). See Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (limitation period is tolled under § 2244 (d) (2) for time period during which properly filed application for post-conviction or other collateral review is pending in state court). Put simply: If the state petition was pending in state court between April 23, and June 13, 1997, the limitation period was tolled during that time and the federal petition filed on June 13, 1997 was timely.

Respondent argues that the state petition did not toll the limitation period because it was not actually filed in the Supreme Court of California until April 25, 1997, two days after the period of limitation expired, and therefore there was no time left to toll. Petitioner submits an exhibit showing that he delivered his petition to prison authorities for mailing on April 21, 1997 and contends that this was his actual filing date under Houston v. Lack, 487 U.S. 266 (1988).

In Houston v. Lack, the Supreme Court held that pro se prisoners' notices of appeal are deemed filed when delivered to prison authorities for mailing to the court. 487 U.S. at 276. This "mailbox rule" is premisd on policy concerns surrounding

pro se prisoners' lack of control over delays between prison authorities' receipt of the notice and its formal filing by the court. See id. at 273-76. Respondent contends that the rule is limited to the filing of notices of appeal and does not apply here.

Although some courts in other circuits have resisted extending the application of the Houston "mailbox rule," see, e.g., Allen v. Dowd, 964 F.2d 745, 746 (8th Cir.) (declining to apply Houston rule beyond notice of appeal context), cert. denied, 506 U.S. 920 (1992);[3] Norlander v. Plasky, 964 F. Supp. 39, 42-43 (D. Mass. 1997) (same), the Ninth Circuit consistently has applied the rule to its cases involving pro se prisoner litigation, see, e.g., Schroeder v. McDonald, 55 F.3d 454, 459 (9th Cir. 1995) (applying Houston rule to service of Rule 59 (e) motion); Caldwell v. Amend, 30 F.3d 1199, 1201 (9th Cir. 1994) (applying Houston rule to filing of Rule 50 (b) motion); Faile v. Upjohn Co., 988 F.2d 985, 988-89 (9th Cir. 1993) (applying Houston rule to service of discovery responses). It even has stated in dicta that "the adversity of interests between prisoners and prison officials central to Houston and its progeny . . . commends extension of Houston's filing exception for pro se habeas petitioners." Caldwell, 30 F.3d at 1201.

This court accordingly joins the Third Circuit in concluding that the reasoning of Houston and its progeny applies with equal force where a pro se prisoner places his habeas petition in the hands of prison authorities for mailing. See Burns v. Morton, No. 97-5568, 1998 WL 15128, at **3-4 (3d Cir. Jan. 9, 1998). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") does not alter this conclusion. See id. (Houston

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3. Butt see Parker v. Bowersox, 975 F. Supp. 1251, 1252-54 (W.D. Mo. 1997) (quesstioning and distinguishing Allen, applying Houston rule to filing of habeas petition, and certifying issue for interlocutory appeal to 8th Circuit).

applies to filing of habeas petition for purpose of satisfying new § 2244 (d) period of limitation added by AEDPA).[4/]

Petitioner handed his state habeas petition to prison authorities for mailing on April 21, 1997, two days before the period of limitation expired. The petition is deemed "properly filed" on that date for purposes of satisfying § 2244 (d) (2). See id.[5/]

It accordingly tolled the limitation period from April 21, 1997 to June 13, 1997, when petitioner filed the instant federal petition.[6/] The federal petition is timely as a matter of law.

IV.

Respondent also urges the court to reconsider its October 29, 1997 order staying the instant petition. The appropriateness of such a stay was addressed recently by the Ninth Circuit. In Calderon v. United States Dist. Court (Taylor), No. 97-70567, 1998 WL 24138, at **6-8 (9th Cir. Jan. 26, 1988), the court held that a district court has discretion to (1) allow a prisoner

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4. See also In re Sims, 111 F.3d 45, 47 (6th Cir. 1997) (deeming § 22444 (b) (3) motion to file second § 2255motion filed on date motion is given to prison authorities for mailing); Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir. 1997) (noting that timeliness of § 2254 petition measured from date papers handed to prison authorities for mailing); Hughes v. Irvin, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) (applying Houston rule to filing of § 2254 petition).

5. Although the issue here is the filing of a state petition, the ultimate determination is a federal one, i.e., whether the filing of the state petition satisfied § 2244 (d) (2). Moreover, California Law does not compel a different result. See In re Jordan, 4 Cal. 4th 116 (1992) (applying Houston rule to California courts).

6. It is undisputed that petitioner's state petition was pending in state court on June 13, 1997.

to amend his petition for a writ of habeas corpus to delete unexhausted claims and (2) stay or hold the amended

FERN M. SMITH
United States District Judge